

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

SYSCO GRAND RAPIDS, LLC,

and

**Cases 07-CA-206108
 07-CA-206109**

**GENERAL TEAMSTERS LOCAL
UNION NO. 406, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS.**

Colleen J. Carol, Esq. (NLRB Region 7)
of Grand Rapids, Michigan, for the General Counsel

Mark A. Carter, Esq. and Forrest H. Roles, Esq. (Dinsmore & Shohl LLP)
of Charleston, West Virginia, for the Respondent

DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases involve two alleged unlawful statements by a lead driver of a food service supplier. I find one of the statements was said but was not unlawful. I find proof lacking that the second statement was made. Accordingly, I recommend dismissal of the complaint.

STATEMENT OF THE CASE

On April 17, 2017, the General Teamsters Local Union No. 406, International Brotherhood of Teamsters (Union) filed an unfair labor practice charge alleging violations of the Act by Sysco Grand Rapids, LLC (Sysco or the Employer or the Respondent) docketed by Region 7 of the National Labor Relations Board (Board) as case 07-CA-197034. The charge was amended on May, 9, 2017, and amended for a second time on August 1, 2017.

Based on an investigation into this charge, and charges in Cases 07-CA-197035 and 07-CA-197039, on August 31, 2017, the Board's General Counsel, by the Regional Director for Region 7 of the Board, issued an order consolidating cases, a consolidated complaint, and notice of hearing in this case. Sysco filed an answer denying all violations of the Act on September 14, 2017.

On September 12, 2017, the Union filed additional unfair labor practice charges alleging violations of the Act by the Employer, and docketed by Region 7 of the Board as Cases 07-CA-206108 and 07-CA-206109. These charges were amended on October 10, 2017, and October 20, 2017, respectively. The charge in Case 07-CA-206109 was amended for a second time on November 15, 2017.

Based on an investigation of these charges, on June 21, 2018, the General Counsel, by the Regional Director for Region 7 of the Board, issued a second order consolidating cases, a second consolidated amended complaint, and a notice of hearing, consolidating Cases 07-CA-206108 and 07-CA-206109 with Case 07-CA-197034, and with Cases 07-CA-206107, 07-CA-19739, and 07-CA-197035. Sysco filed an answer to this second consolidated amended complaint on July 3, 2018, denying all violations of the Act.

On September 24, 2018, the Regional Director for Region 7 of the Board issued an order severing Cases 07-CA-197035, 07-CA-197039, and 07-CA-206107, and certain allegations of Case 07-CA-197034, from Cases 07-CA-206108 and 07-CA-206109, and from the remaining allegation in Case 07-CA-197034. The order approved a conditional settlement agreement as to the allegations in the severed cases and the severed allegations from Case 07-CA-197034, and the order further withdrew certain allegations from the consolidated amended complaint. A corrected order severing these cases as described issued on September 25, 2018.

A trial in this matter was conducted on September 26 and October 18, 2018, in Grand Rapids, Michigan. During the hearing, counsel for the General Counsel moved to amend paragraph 12 of the consolidated complaint,¹ and later in the hearing moved to withdraw paragraph 10 of the consolidated complaint. Both of these motions were granted. In her posttrial brief (GC Br. at 2 fn. 3), counsel for the General Counsel notes that with the withdrawal of the allegation in paragraph 10 of the complaint, no allegations from Case 07-CA-197034 remain part of the consolidated amended complaint, and accordingly, counsel for the General Counsel moves that the caption in this matter be amended to remove Case 07-CA-197034. I agree, and the caption has been so amended.²

Counsel for the General Counsel and counsel for the Respondent filed posttrial briefs in support of their positions by November 26, 2018.

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

At all material times, Sysco has been a corporation and has been engaged in the nonretail sale and distribution of food products and related services at its facilities located in Alanson, Cadillac, Kalkaska, West Branch, Niles, White Pigeon, and Grand Rapids, Michigan. In conducting its operations during the calendar year ending December 31, 2017, Sysco purchased and received at its Michigan facilities goods and products valued in excess of \$50,000 directly from points located outside the State of Michigan. At all material times, Sysco has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

¹This amendment was subsequently reduced to writing and entered into the record as General Counsel's Exhibit 3.

²Hereinafter, references to "the complaint" are to the extant consolidated complaint, as amended.

UNFAIR LABOR PRACTICES

Background

Sysco is in the food services business. It delivers food to businesses, schools, hospitals, restaurants, and other institutions. Sysco's warehouse is in Grand Rapids, Michigan. It maintains several depots in northern (Alanson, Cadillac, Kalkaska, West Branch) and southwestern (Niles, and White Pigeon) Michigan. Trailers loaded with food products are driven from the warehouse to the depots and from there drivers deliver the food to Sysco customers.

A 2014-2015 union drive among Sysco employees resulted in numerous unfair labor practice charges and objections to a May 7, 2015 representation election. A hearing before an administrative law judge resulted in a March 2, 2017 decision and recommended order that, *inter alia*, found numerous unfair labor practices and recommended issuance of a *Gisse*³ bargaining order as part of the remedy. *Sysco Grand Rapids, LLC* 2017 WL 830017, JD 15-17. The Employer's exceptions to this decision and recommended order were pending before the Board at the time of the issuance of the instant decision.

The misconduct alleged in the instant cases occurred at the Alanson, Michigan depot—the largest and northernmost of the Sysco depots—in or about August 2017. Approximately 14 or 15 Sysco drivers work out of the Alanson depot. In the summer months, coincident with the northern Michigan tourist season, additional temporary drivers—one estimate was four to six—are “leased” from a company called PMP (identified in the record as the Petosky Manpower Temporary Agency). These temporary drivers are typically laid off around Labor Day.

The two alleged unfair labor practices at issue here each involve alleged statements made by Sysco's lead driver at the Alanson depot, Kevin Lauer. In August 2017, and for several years before, Lauer was the highest ranking Sysco employee regularly stationed at Alanson.⁴

1. The alleged implicit threat to enforce rules more strictly because of the Union's status as employees' collective-bargaining representative (complaint ¶11)

Mike Evoy is a veteran shuttle driver at the Alanson facility and has worked for Sysco for 33 years. On or about August 9, 2017, Evoy brought a union flyer to the Alanson facility and at the end of his shift left it on a table in a small room in the facility where employees do paperwork.

A number of employees were in the room and a conversation started among Evoy and a few other employees—including Lauer and including PMP temporary drivers Doug Schlappi and Aaron Vorac—about unions, including “how unions were either good or bad.”⁵

³*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁴The General Counsel contends that Lauer is a supervisor and/or agent of the Respondent under the Act. The Respondent denies this. Given my resolution of the substantive allegations I do not reach the issue. In other words, for purpose of this decision, I assume without deciding that Lauer is a statutory supervisor and agent of the Respondent under the Act.

⁵Evoy testified that the opinions on unions of Schlappi—who was Lauer's uncle (in-law)—and Vorac were solicited or “instigated” by Lauer. The General Counsel does not allege that this was

Someone said that “the Unions tend to enable poor performing employees.” At that point, according to Evoy, Lauer “made reference to a couple of our employees, myself included, who were good performing employees with regards to company policies.” Evoy testified that Lauer, referring to Evoy, stated that:

If some policy may have been violated by somebody that the company liked, because, like for example, if I bust my ass, I do my job, I bust my ass, if I screw up the company is likely to work with me to get through any disciplinary process. . . .

Kevin said—“You, for example, you bust your ass. . . doing your job.” And he says, “So you know, because they like you, they’re going to do more things to keep you here versus somebody that may not be performing as well.”

Evoy testified that Lauer then referenced an employee from the Kalkaska depot, Mark Larson, who had been terminated along with two other employees in February 2017, for a food safety violation. According to Lauer, because Larson was an employee who “busted his ass,” he would have not been discharged but for the Employer’s desire to show the Union that it was meting out equal punishments to all three employees found guilty of the same offense:

[Lauer] said that an example of the disciplinary action that happened then, three employees were terminated, Mark Larson being one of them, that Mark, as I did, busted his ass doing his job, but because he was—he had to be fired along with the other two employees because if they would have kept him and not the other two, then the Union would have made a deal out of it because everybody wasn’t being treated the same.

The transcript continues, with Evoy answering counsel’s questions:

Q. And do you recall if he said anything else during that conversation?

A. We had that—we talked back and forth how I felt that everybody should be treated the same. The company guidelines are the company guidelines. Everybody should have equal treatment. And that was my feeling. We—if a policy is made, it should be applied to everybody equally. I mean even though, you know.

Q. And did he respond at all when you voiced your opinion?

A. Not that I recall.

Schlappi, who was a PMP temporary driver in August of 2017, recalled a conversation, with Evoy and other delivery employees one morning at the garage, where Lauer asked him “if we was union at the bus garage”—Schlappi’s former place of employment—and Schlappi indicated that they were “but we dropped them.” Schlappi did not recall any mention of Larson or any mention of disciplining employees in the conversation, but he agreed that when he left the conversation Lauer was still there with the other employees standing around talking.

independently unlawful and, therefore, I do not consider whether it was.

While Evoy was not sure whether employee Dean Enos was present for the conversation, Enos testified that he came across a conversation between several employees, including Lauer, Schlappi, Vorac, and Evoy, that had already started when he arrived back from a run early one morning, where Lauer asked Schlappi and Vorac about their views of unions.⁶

Lauer testified and endorsed Schlappi's testimony, and testified that he recalled having a conversation with Schlappi, Evoy, and others about the Union. Lauer testified that Evoy took a position in favor of the Union, and he (Lauer) was taking the opposite position. Lauer recalled telling employees to ask Schlappi about his past experience with a union and remembers Vorac being very "vocal" in his opinion. Lauer did not remember everything that was said—and he did not recall Enos being present. He denied ever speaking with Enos about Larson, or having any discussion with Enos about being "disciplined if you bust your ass at work," but was not asked and did not make similar denials with regard to having such a discussion with Evoy.

In terms of credibility, the matter is not clear cut, but I find it more likely than not that Evoy's account is accurate. Evoy's testimonial demeanor was believable. It did not seem to be embellished or exaggerated. His recall seemed honest to me. As discussed below, the key part of Evoy's account was Lauer's story about the terminated employee Larson, which Lauer used as an example of how the union's presence inhibited the employer from more leniently disciplining employees of whom it approved or believed to be "good performing" employees.

Notably, while Lauer, Schlappi, and Enos, clearly recalled a conversation where people expressed their views on unions, none mentioned Lauer's comments about Larson or how some employees "bust [their] ass." But this does not convince me that Evoy is wrong in his account.

Schlappi's account was very vague—he did not seem to remember much, and the fact that he did not recall the Larson story does not impress me in comparison to Evoy's surer recollection.

Enos did not mention the Larsen story, but no one else even recalls Enos being present. Evoy was unsure and admitted to having no specific recollection of Enos being present (Tr. 53), and neither Schlappi nor Lauer recalled Evoy being there. This suggests, at most, that Evoy was only present briefly and missed a lot of the discussion.

Lauer's testimony is the final (and most important) straw convincing me to credit Evoy's account. It is not that Lauer testified in a manner that lacked credibility. But the fact is that Lauer—who was the employer's representative for the trial and, because of that, and unlike every other witness, was excepted from the sequestration rule on separation and heard the other employees' testimony—failed to rebut the key piece of testimony by Evoy about the Larson comments. His testimony simply did not treat with Evoy's claims that Lauer talked about Larson and employees who "bust [their] ass." Whether by calculation or mistake, Lauer was asked and denied (Tr. 290) having a discussion about these subjects with *Enos*—but did not address whether these remarks were made with or to *Evoy*. The denial about Enos is not meaningful, as Lauer was very clear that he did not remember Enos being present at all for any of the conversation, and hence, his denial of having this specific aspect of the conversation with Enos tells us nothing about what he said to Evoy, who Lauer agreed was present. Again, I think that Lauer's presence for Evoy's testimony cannot be ignored, and despite being present, the upshot is that he failed to rebut the key piece of testimony offered by Evoy. Notably, the rest of Evoy's

⁶Enos claimed that in that conversation Lauer remarked to the other employees, words to the effect that they were "wasting [their] time supporting the Union." Enos testified that in light of Lauer's remarks he did not wear his union cap for three days thereafter.

testimony was, broadly speaking, corroborated by Lauer and Schlappi. I credit Evoy's account, including his testimony about Lauer's statements about the Larson termination and the effect of the union's presence on the employer's meting out of discipline.

5 Analysis

10 The General Counsel contends that "Lauer's statement constituted a clear threat of reprisal against employees who supported the Union." (GC Br. at 21.) I do not agree. Nor, is it accurate to say, as alleged in the complaint, that Lauer "implicitly threatened that [the Respondent] would enforce its rules more strictly because of the Charging Party's status as the exclusive collective-bargaining representative at its Michigan facilities." (Complaint at ¶11.) That is not what he said.

15 What Lauer said and conveyed was that with a union, in disciplinary situations the employer would treat employees equally in order to avoid objections from the union. Lauer's statement was that while the employer would prefer to be (and in Larson's case would have been) more lenient with employees whom it favored, with a union it was necessary to treat employees equally in the disciplinary process.

20 It is worth noting—but not dispositive—that in response, Evoy essentially endorsed the point, expressing that "everybody should be treated the same. The company guidelines are the company guidelines. Everybody should have equal treatment. And that was my feeling."

25 Evoy's response is not surprising. Equal treatment of employees, the application of "just cause," to discipline, and the elimination of a work culture where employer favorites can expect different disciplinary treatment than the run-of-the-mill employee, constitute some of the most fundamental and basic goals of union organization, and, indeed, of many nonunion HR systems. I note that Evoy's response is not relevant for showing the effect of Lauer's comments, as it is well settled that in evaluating the remarks, the Board does not consider either the motivation behind the remarks or their actual effect.⁷ However, Evoy's response is relevant for understanding the meaning of Lauer's remarks. See *Miller Towing Equipment, Inc.*, 342 NLRB 1074, 1077 (2004) (consideration of employees' retort to manager's statement demonstrates that employee understood the point manager was making).

35 As the Board stated in *International Baking Company and Earthgrains*, 348 NLRB 1133, 1135 (2006), citing *Tri-Cast Inc.*, 274 NLRB 377 (1985):

40 Generally, an employer does not violate the Act by informing employees that unionization will bring about "a change in the manner in which employer and employee deal with each other." An employer may lawfully tell its employees that its freedom to deal directly with them will be constrained if they choose union representation. [Citation omitted.]

45 In *International Baking Company and Earthgrains*, 348 NLRB 1133, 1135 (2006), the Board found it lawful for an employer to tell employees that "unfortunately under a union contract if there is a disciplinary procedure in that union contract we would not have the luxury of deviating from it because we end up with union grievances as a result of it."

⁷*Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), *enfd.* 134 F.3d 1307 (7th Cir. 1998).

Essentially, I agree with the Respondent that Lauer's comment was a variant—and a close one—of the statement in *International Baking Co.*, and similar statements also found lawful, such as that with a union representing the workforce the employer would have to “go by the book” in its treatment of employees, and that it would have less ability to deal individually with employees. *Tri-Cast, Inc.*, 274 NLRB 377 (1985) (not objectionable for employer to state in letter to employees that “If the union comes . . . We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing”); *Beverly Enterprises*, 322 NLRB 334,344 (1996) (lawful to tell employee that “if the Union comes in, she would have to go by the book; she wouldn't be able to treat the nurses individually anymore”), enft. denied on other grounds, 139 F.3d 135 (2d Cir. 1998).

In this case, Lauer's comments went to likelihood of consistency in the discipline of employees. “The fact that such a statement might tend to discourage union support among employees who prefer to deal with their employer on an individual basis, does not render the statement unlawful.” *International Baking Co.*, supra at 1135.

In other words, that certain employees who are favored by management might hear in Lauer's comments a self-interested rationale to decline to support union organization does not give the comments a reasonable tendency to be coercive. *Trash Removers, Inc.*, 257 NLRB 945 (dismissing allegation that supervisor violated the Act by telling employees that his past favored treatment of employee relatives would have to stop under the union contract because a union demands that all of its members be treated alike). See *Miller Towing Equipment, Inc.*, 342 NLRB at 1077 (dismissing Sec. 8(a)(1) based on supervisor's statement that Respondent's flexibility to modify overtime policy on short notice would be more difficult or impossible with a union in workplace and employee responded “that's why we want a union”). It is a fact of industrial life—and as with Evoy, a fact usually endorsed by union supporters—that the unionized employer has increased incentive to strive for consistency in its disciplinary procedures.

Contrary to the contention of the General Counsel, Lauer's comments were not a statement that, because of union representation there would be a tightening of disciplinary or other standards previously not enforced, or the meting out of generally harsher discipline because of the Union. Lauer's comments did not suggest that employees who supported the union would face less leniency or stricter enforcement of rules. Thus, Lauer's comments were significantly different than the statements made in cases cited by the General Counsel, where employers promised stricter enforcement of rules in retaliation for the selection of union representation. See, e.g., *Treanor Moving & Storage*, 311 NLRB 371, 374–375 (1993) (Board found unlawful employer's announcement of an “attendance policy crackdown,” suddenly requiring employees to adhere to a previously unenforced attendance policy requirement to call-in before missing work because of unionization); *Miller Industries Towing Equipment*, 342 NLRB 1074, 1084 (2004) (unlawful to threaten that unionization would result in stricter enforcement of rules and less lenience with regard to lunch and breaktimes).⁸

⁸The General Counsel also cites *Onsite News*, 359 NLRB 797, 2013, a case that is of no precedent because of the Supreme Court's ruling in *NLRB v. Noel Canning*, ___ U.S. ___, 134 S.Ct. 2250 (2014), and that, in any event, is inapposite. That case involved a manager who told an employee after a grievance meeting that in the future “he should speak to [the manager] directly about any problems rather than relying on the Union . . . [o]therwise, [the manager] would have to be stricter if the Union continued to be involved . . . because he would have to comply with the CBA provisions”). This inducement to bypass the established union is not the same as or even analogous to Lauer's assertion that because of the union's presence the employer would treat disciplinary offenses in a nondiscriminatory manner.

Accordingly, I do not find Lauer's comments to be violative of Section 8(a)(1).

2. The alleged implicit threat of reprisals including to change work schedules because of the Union's status as the employees' collective-bargaining representative (complaint ¶12)

Dean Enos has worked at the Alanson facility since March 2016, first as a PMP temp driver and then, since approximately February 2017, as a Sysco employee. He is a shuttle driver.

Enos showed support for the union drive by wearing a Teamsters baseball cap beginning on a Sunday in August 2017. Enos testified that after he came back from his delivery run he encountered Evoy and some other employees, and Kevin Lauer, discussing the Union. Enos testified that Lauer told the employees that "the Union don't ever do anything for people, how we're all wasting our time." At the hearing, Enos endorsed the statement in his pretrial affidavit that because of these comments by Lauer, Enos stopped wearing the Teamsters hat for a few days.⁹

Enos also testified about an incident that occurred two nights later, on Tuesday August 22, 2017, while he was in the parking lot with Lauer smoking cigarettes.

Lauer drafted the work schedules for employees as part of his duties as lead driver. On direct examination, Enos testified that while he and Lauer were talking, a temporary PMP employee, Jonathon Ware, came out and asked Lauer why Enos "always got the Friday nights,"—meaning, why did Enos always get to work six days a week. Enos desired to work six days a week and "chimed in and said because I was an employee I got time before temps did."

The prospect of working six days a week was only possible in the busy summer months. By this time in late August 2017, the summer was winding down and hours were being reduced. Indeed, the temporary employees would be laid off in coming weeks, as was routine. After the week ending August 26, 2017, for which Enos was scheduled to work six days, there were no more shuttle drivers scheduled to work six days in the coming weeks. They were scheduled for only five days.

Lauer then said that the following week Enos would have a day off in the middle of the week. This was not Enos' preference—he wanted to work six days a week, but if he could only work five, he wanted the days off to be Friday (and Saturday was always scheduled off), and to work his five days straight through during the week.

Enos testified that he asked Lauer, "why am I down to 5 days?" Lauer mentioned that the hours were winding down. Enos asked Lauer, "Well, why am I getting a day off in the middle of

⁹Enos testified that in this conversation Evoy was present and Lauer asked Schlappi and Vorac to give their opinion of unions. Thus, this conversation sounds like the one Evoy described, except that no one else who testified recalled Enos being present, and no one else testified to Lauer making the statement about employees "wasting [their] time" seeking a union. Further, Enos did not recall the statements attributed to Lauer by Evoy in this conversation, and Enos dated the conversation specifically to Sunday August 20 (Tr. 91–92), eleven days after the date Evoy believed this conversation with Lauer, Schlappi, and Vorac occurred.

the week . . . instead of having a full day weekend?” Enos testified that “that’s when he [Lauer] mentioned the hat that I’d been wearing” previously.¹⁰

Lauer testified, and denied that he had made any type of threat relating to Enos wearing a Teamsters hat, and further, noted that a number of employees regularly wore a Teamsters hat. Lauer, testified that he told Enos that Ware had asked for that following Friday off for a “personal” reason, “[t]hat’s why you’re working Friday night.”¹¹

Enos testified that he was taken aback by Lauer’s comment about the hat, and told Lauer that he was going to call Joe Quisenberry, the Sysco supervisor in Grand Rapids who approved the schedules that Lauer wrote up for employees.

The next day Enos talked to Quisenberry. Enos testified that he told Quisenberry about Lauer’s comment about the hat. Quisenberry asked Enos if he felt “singled out” for his union support, and Enos told him that he did. Quisenberry told Enos he would check into it.

A couple of days later, Enos saw Lauer at work and Lauer told him that he “felt like I stabbed him in the back by calling Joe [Quisenberry].” According to Enos, Lauer ramped up his threats, telling Enos that

“You know, all you guys that support this union when this union does come in these routes are going to be up for bids,” and he said he’s going to make sure I was down to like three days a week, bare minimum, that nobody else around there liked me, they were all going to bid to make sure that I didn’t get routes.

The following week, Enos was working at the warehouse in Grand Rapids and saw then director of transportation for Sysco, Todd Yocum. Enos asked Yocum if he could talk with him when he had time. A little later Yocum called Enos into his office. Enos testified that he told Yocum about his encounter with Lauer. Yocum told Enos that he had never known Kevin to be vindictive or spiteful (or words to that effect) but that “he would check into it and let me know.”

Yocum testified about the conversation he had with Enos, which he dated as August 30. In addition, Yocum made notes of the conversation within a day or two, after he had followed up with Lauer. These notes are in evidence as Respondent Exhibit 5.

As a matter of demeanor, Yocum was clearly invested in the Employer’s position, yet the absence of any reference in his testimony or notes to the alleged Lauer threat of putting union supporters’ routes up for bid and reducing Lauer to a “bare minimum” of work, is significant. In his testimony and notes of the conversation, Yocum made reference to Lauer’s alleged August 22 comment about Enos’ hat—i.e., the one-day switch in scheduling attributed to the hat. But Yocum made no reference at all—in his testimony or notes—to the subsequent alleged threat by

¹⁰In his direct testimony, Enos answered questions in a manner that made it sound as if he was wearing his hat during this conversation. (Tr. 71) but in light of his clarification on cross-examination, I believe—and find—that he was not. I believe that his answer on direct to a question about the hat he was “wearing at that time” was a reference to the wearing of the hat before and after this incident in during August 2017. I do not believe that Enos contradicted himself, although the cold record might be read to suggest that he did.

¹¹Ware testified that he had previously asked Lauer for that Friday off to enable him to go on a camping trip with his daughter. There is no allegation that the scheduling of Enos was discriminatory.

Lauer to put union supporters' routes up for bid and to reduce Enos' work to a "bare minimum." Unless Yocum is hiding it, that subsequent threat, which according to Enos was the last threat preceding his conversation with Yocum, would have been in Yocum's notes and a feature of his testimony, if Enos had mentioned it.

This leads me to believe that Enos did not mention it in his conversation with Yocum. And if Enos did not mention it, it did not happen, because it is highly unlikely that if it happened he would have not raised it to Yocum. By Enos' account, it was the most recent threat, and a significant one, threatening far more dire consequences than a one-time single day switch in scheduling. This is a significant blow to Enos' credibility in my view.

In fact, Yocum's testimony, buttressed by his notes, reveals that the main issue on Enos' mind was his indecision about whether he wanted, or did not want, to work on Fridays. This indecision was mirrored, or duplicated, at the hearing, with Enos' contradictory testimony about whether Ware was being "an asshole" by questioning why Enos and not he got to work most Fridays, or, rather, because Ware did not want to work on a Friday. (Tr. 70, 93.)

Neither of Enos' claimed threats by Lauer is corroborated. And, as noted, more generally, there is some confusion in his testimony. But more to the point, as discussed above, there is affirmative reason to suspect that the subsequent threat testified to by Enos was not made. That conclusion, in particular, undermines Enos' credibility generally. In addition, his demeanor was not convincing. Enos appeared angry at times and displayed a general combativeness when questioned by opposing counsel. While I would not go so far as to characterize his demeanor as overtly suspicious, I would say that nothing in his demeanor overcomes the suspicion generated by my conclusion that Enos' testimony about the final threat was invented. Lauer, as noted, denied making the threats. His demeanor was unremarkable—it evoked no strong opinions on my part as to his credibility.

In sum, I believe it more likely than not that Lauer did not make the comment that union supporters would have their routes put out to bid and that Enos' work would be reduced to a "bare minimum." I am less sure that no comment was made by Lauer about switching Enos' schedule for a day in August because of his hat. However, given my overall concerns about Enos' credibility, I do not credit Enos' testimony about it. Given all the evidence, and the comparative demeanor of Lauer and Enos, I believe it to be unproven.¹²

Analysis

Given my credibility resolutions, this allegation must be dismissed. I find the allegation factually unproven.

¹²There is also the earlier comment that Enos claims that Lauer made during a conversation with numerous employees—perhaps at the same incident where Lauer made his comments to Evoy—where Lauer allegedly remarked that employees were "wasting [their] time supporting the Union." This comment is not pursued in the complaint or by the General Counsel as an independent violation. In any event, it is uncorroborated, and my overall doubts as to Enos' credibility lead me to find that it is unproven.

CONCLUSIONS OF LAW

The Respondent did not violate the Act as alleged in the complaint.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

10 The complaint is dismissed.

15 Dated, Washington, D.C. January 11, 2019



David I. Goldman
U.S. Administrative Law Judge

¹³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.